

DEVELOPMENT & COMMERCIAL BANK BHD.

v.

DATUK KRISHNA KUMAR SHARMA

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CODE NO. C23-2297-86]
28 APRIL 1988

CONTRACT: *Joint and several guarantee - Whether guarantee covers prospective loans only - Whether guarantor liable for loan given to a subsidiary of borrower - Whether defendant's admission of indebtedness amounts to estoppel - Conclusive evidence clause as to amount of indebtedness in guarantee - Whether valid.*

The defendant executed a joint and several guarantee dated 30 May 1979 in favour of the plaintiffs whereby he agreed to pay the plaintiffs all sums due and owing from MPC Holdings Sdn. Bhd. ("MPC") to a limit of RM60 million. The plaintiff had foreclosed on MPC's property in an earlier action where consent judgment had been recorded in the Federal Court and where the defendant had on a day before the consent judgment was recorded written to the plaintiff wherein he confirmed his indebtedness to the plaintiffs. The plaintiffs sought to recover the balance of the sum outstanding by MPC to the plaintiffs from the defendant.

The following issues were raised for the determination of the Court:

- (a) whether the guarantee only covers prospective loans and not those made after the guarantee was signed;
- (b) whether MPC and therefore the defendant be liable for a loan of RM23 million originally granted by the plaintiffs to a subsidiary of MPC;
- (c) whether the defendant's admission of indebtedness and the consent judgment in the earlier action estopped the defendant from challenging his liability;
- (d) whether non-compliance with the consent judgment relieves the defendant from liability under the guarantee.

Held:

[1] That the wording of the guarantee was clear in that the defendant's liability is to pay all sums due and owing by MPC to the extent of RM60 million and was not only limited to prospective loans.

[2] On the evidence it was clear that in respect of the loan given to the subsidiary of MPC it had been transferred to MPC's account with the plaintiffs and as such as MPC is liable for the loan, the defendant is likewise liable for the loan.

[3] In respect of the consent judgment entered in the earlier action against MPC the question of estoppel did not arise at all as the defendant is sued on the guarantee and the letter of admission is an additional piece of evidence against the defendant.

[4] Non-compliance with the consent judgment in the earlier action did not absolve the defendant from liability under the guarantee.

[5] That as long as a certificate is given by an officer of the plaintiff that is conclusive evidence of his indebtedness to the plaintiff in accordance with the conclusive evidence clause in the guarantee.

[Judgment for the plaintiff.]

a Case referred to:

Dobbs v. National Bank of Australasia Ltd. [1935] 53 CIR 643

For the plaintiffs - D.P. Naban (Aznam Mansor with him); M/s. Skrine & Co.

For the defendant - K.S. Narayanan; M/s. Ng Ek Teong & Partners

JUDGMENT**b Siti Norma Yaakob J:**

The defendant in this action is sued as a guarantor pursuant to a joint and several guarantee dated 30 May 1979 executed by him with the plaintiffs whereby he agreed to pay to the plaintiffs all sums due and owing by a company, known as MPC Holdings Sdn. Bhd. (MPC) of which he is its managing director. However, to appreciate the true nature of the plaintiff's claim, it is necessary that I trace the transactions and dealings the plaintiffs had with MPC and the defendant as they have a bearing to the issues at hand.

From the agreed bundle of documents, (AC106), it is very clear that MPC had been a trusted customer of the plaintiffs for as at 15 December 1978, it was indebted to the plaintiffs in the region of over RM31 million for various facilities extended by the plaintiffs to it.

On 7 February 1978, the plaintiffs extended its facilities further by agreeing to arrange payment of RM9,639,000 to enable MPC to complete the purchase of a piece of property at Taman Intan, Johor and accepting the same piece of land as security for this extended facility as well as an added security to the other facilities already extended to MPC together with the personal guarantees of the defendant and one Mohd. Idris (AC 106 - 113). This guarantee was subsequently executed on 30 May 1979 (AB 1- 4) and forms the subject matter of the instant proceedings before me.

MPC, however, failed to service the facilities extended to it and as at 14 April 1981, it owed the plaintiffs RM68,903,974 which included a term of loan of RM23 million which was originally extended by the plaintiffs to MPC's subsidiary, Tampoi Jaya Sdn. Bhd.

When MPC failed to meet the demand to pay, the plaintiffs commenced foreclosure proceedings on the Johore property in the High Court at Johore Bahru on 13 October 1981. The application for sale was resisted by MPC and an intervener, representing a group of unsecured creditors of MPC but nonetheless an order for sale was granted by Datuk Mohd. Yusoff Mohamed J on 6 November 1982. Dissatisfied with this decision, MPC appealed to the then Federal Court but on the date of hearing on 25 April 1983, the appeal was withdrawn and 3 days later on 28 April, 1983, the Federal Court recorded a consent judgment on terms appearing at AC 215 - 224.

However, on 27 April 1983, a day before the consent judgment was entered, the defendant wrote AB 5, wherein he confirmed his indebtedness to the plaintiffs despite the release of Mohd. Idris from the guarantee, and he further gave his sole and unqualified undertaking to pay all sums due by MPC to the plaintiffs.

One of the terms of the consent judgment was that MPC had to settle its debts to the plaintiffs by paying various stated sums by 1 May 1984, failing which the charged property would be sold by public auction on 31 July 1984 at the reserved price of RM95 million. If this sale proves abortive, further directions would be sought from the Senior Assistant Registrar the following Monday, following the abortive sale.

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MPC failed to settle its debts by 1 May 1984 and when the auction sale on 31 July 1984 proved abortive, 4 other auctions were held at the reduced reserve prices of RM83 million, RM75 million, RM60 million and RM50 million respectively and each successive sale proved to be abortive. It was only when the reserved price was reduced further to RM25 million that there was a successful bidder in the person of the plaintiffs themselves. **a**

MPC questioned the propriety of the plaintiffs purchasing the property at the reduced reserved price of RM25 million and litigation on this objection firstly resulted with V.C. George J setting aside the auction on 19 December 1986 but on appeal, the Supreme Court, on 5 May 1987, allowed the appeal with costs and held that the sale of the property to the plaintiffs at the reduced reserve price of RM25 million was proper. **b**

That brings me to the present proceedings which is a manifestation of the plaintiffs' intention to recover part of the balance still due from MPC by suing the defendant personally on the guarantee dated 30 May 1979 to the limit of RM60 million as stated in the guarantee. **c**

Many defences were raised by the defendant in his statement of defence but at the trial, his Counsel has narrowed these to 4 namely,

1. whether the guarantee covers only to prospective loans and not to those made after the guarantee was executed on 30 May 1979. **d**
2. whether MPC should be held liable for term loan of RM23 million which was originally granted by the plaintiffs to Tampoi Jaya, a subsidiary of MPC.
3. whether the defendant's admission of indebtedness contained in AB5 and the consent order dated 28 April 1983 (AC 214 - 224) estopped the defendant from challenging his liability under the guarantee, and **e**
4. whether non-compliance with the terms of the consent order relieves the defendant from any liability whatsoever under the guarantee.

It is not disputed that no further sums of money were extended by the plaintiffs to MPC after the guarantee was executed. Nevertheless, the rights and obligations of the defendant, as a guarantor, are governed by the terms and conditions of the guarantee and to determine the full extent of the defendant's liability, the consideration for such a guarantee is most relevant. **f**

Clause 1 of the guarantee (AB1) states the consideration to be "the making or continuing advances or otherwise giving credit or affording banking facilities and accommodation" followed by the defendant's liability which is payment on demand "of all money and liabilities whether certain or contingent now or hereafter owing or incurred to the bank (plaintiffs) from or by the customer (MPC) on any current or other account or in any manner whatsoever whether as principal or surety and whether or jointly with any other person". Reading this clause, I consider that the words "now or hereafter owing" just about sum up the defendant's liability to pay MPC's debts but the extent of his liability is limited to RM60 million "together with such further sums for interest thereon and other commissions, banking charges, legal and other costs charge expenses whether incurred in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the money hereby guaranteed. ... within 12 months before or at any time after the date of demand". The plaintiffs, through their solicitors, sent their letter of demand to the defendant dated 11 July 1986 demanding payment of RM60 million, interest at 12.75% from 11 July 1985 to date of full payment plus payment of all expenses, legal charges and costs incurred in the sale of the Johore land from the period 11 July 1985 to date of demand. **g**
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- a** Reading cl. 1 in its entirety, it is very clear that the defendant's liability is to pay all sums due and owing by MPC but limited to RM60 million plus interest, legal charges and the expenses incurred in the foreclosure proceedings. To that extent the guarantee includes the sum that is now being claimed by the plaintiffs and does not cover only prosecutive loans i.e., loans to be granted after the execution of the guarantee, which as I have stated earlier, was never granted by the plaintiffs to MPC.
- b** Objection was also raised as to the inclusion of the RM23 million term loan as being part of the defendant's liability as it was never granted to MPC in the first place but to its subsidiary, Tampoi Jaya Sdn. Bhd. It is the defendant's contention that the RM23 million should not be included as part of his liability under the guarantee.
- c** Admittedly the term loan was originally granted to Tampoi Jaya as evidenced by AE71 and AE72 but cognisance must also be given to Tampoi Jaya's resolution dated 28 February 1979 (AC 129) signed by the defendant as a director of Tampoi Jaya, giving authority to the transfer of the term loan to MPC's accounts with the plaintiffs and on the strength of this resolution, the plaintiffs effected the transfer the same day as evidenced by AE78.
- d** The defendant then relied on AE79, a letter dated 17 September 1980 sent by the plaintiffs to Tampoi Jaya informing it of the new rate of interest payable by Tampoi Jaya. Then again there is the plaintiffs' statement of account dated 28 September 1981, AE80, which refers to the term loan as Tampoi Jaya's fixed loan, but I must stress here that the statement of account is addressed to MPC not to Tampoi Jaya.
- e** I do not consider that the defendant can escape liability on the RM23 million loan on the strength of AE79 alone as he has to contend with the consent judgment where at AC215, MPC has fully acknowledged that as at 28 April 1983, it was indebted to the plaintiffs in the sum of RM82,852,084 which includes the term loan of RM23 million and since the guarantee is for payment on demand of all sums whether certain or contingent, incurred by MPC on any current or other account, or in any manner whatsoever, the defendant's liability under the guarantee does include liability to pay for the term loan of RM23 million as well.
- f** I now come to consider the effect of AB5, written by the defendant in his capacity as a guarantor as his first few words make reference to the guarantee as does the caption on the letter. In it he confirms his acceptance of the terms of the consent judgment appearing at AC 214 - 249 and his acknowledgement that despite the release of the other guarantor named in the guarantee, he is still personally liable to pay the plaintiffs for all debts due from MPC. The defendant maintains that since he was not a party to the consent judgment, he is not estopped from challenging his liability under the guarantee. To me the issue of estoppel
- g** does not arise at all as the defendant is sued on the guarantee and it is therefore immaterial that he was not a party to the consent judgment. However, together with the guarantee there is AB25, an added piece of documentary evidence that strengthens the plaintiffs' claim against him. Likewise if there had been non-compliance of the consent judgment this does not absolve the defendant of his liability under the guarantee.
- h** Interestingly, the guarantee also contains the conclusive evidence clause where at cl. 19, the defendant has acknowledged that a certificate by an officer of the bank as to the money and liabilities for the time being due and incurred to the bank from or by the customer (MPC) shall be conclusive evidence in any legal proceedings against him. Such a certificate is found at AB14 and following *Dobbs v. National Bank of Australasia Ltd.* [1935] 53 CLR 643, such certificate is conclusive evidence of the amount due to the plaintiffs from MPC and since
- i** the defendant has guaranteed payment of this amount to the plaintiffs, but limited to RM60

million plus other expenses as stated in the guarantee, he is therefore liable to make payment to the plaintiffs and on that finding, judgment is entered for the plaintiffs in terms of prayers (a), (b), (c) and (e) of their statement of claim.

Also found at [1988] 2 CLJ 452

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